

BRB No. 12-0349 BLA

JUANITA C. ASKEW)	
(Widow of EARL D. ASKEW))	
)	
Claimant-Respondent)	
)	
v.)	
)	
DRUMMOND COAL, INCORPORATED)	DATE ISSUED: 02/27/2013
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra Harris, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Will A. Smith (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-6146) of Administrative Law Judge Lystra Harris rendered on a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended*

by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), P. L. No. 111-148 (2010). The amendments, in pertinent part, revive Section 422(l) of the Act, 30 U.S.C. §932(l), which provides that the survivor of a miner who was eligible to receive benefits at the time of his or her death is automatically entitled to survivor's benefits, without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(l).

In her Decision and Order Awarding Benefits, the administrative law judge found that claimant¹ satisfied the criteria for derivative entitlement pursuant to amended Section 932(l), and awarded benefits to commence as of March 2011, the month in which the miner died.²

On appeal, employer challenges the constitutionality of amended Section 932(l), and its application to this claim.³ Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's application of amended Section 932(l) to this case.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant is the widow of the miner, who died on March 19, 2011. Director's Exhibit 4. She filed her survivor's claim on April 28, 2011. Director's Exhibit 2.

² At the time of his death, the miner was receiving federal black lung benefits pursuant to an award on his lifetime claim. Director's Exhibit 1.

³ Employer also challenges the constitutionality of the Patient Protection and Affordable Care Act (PPACA) and the severability of its non-health care provisions. Subsequent to the filing of employer's Brief in Support of Petition for Review, the United States Supreme Court upheld the constitutionality of the PPACA. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012). Thus, employer's arguments regarding the constitutionality of the PPACA are moot.

⁴ The record indicates that the miner was employed in the coal mining industry in Alabama. Director's Exhibit 1. Accordingly, the law of the United States Court of Appeals for the Eleventh Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We reject employer’s contention that retroactive application of the automatic entitlement provisions of amended Section 932(l) to claims filed after January 1, 2005 constitutes a due process violation and a taking of private property, for the same reasons the Board rejected substantially similar arguments in *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-200 (2010). *See also B & G Constr. Co. v. Director, OWCP [Campbell]*, 662 F.3d 233, 25 BLR 2-13 (3d Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). We also reject employer’s contention that claimant is not entitled to benefits pursuant to amended Section 932(l) because she did not prove that pneumoconiosis caused, or contributed to, the miner’s death. Contrary to employer’s contention, the automatic entitlement provisions of amended Section 932(l) provide benefits to a survivor without the requirement that she prove that the miner’s death was due to pneumoconiosis. *Campbell*, 663 F.3d at 249-50, 253, 25 BLR at 2-38-39, 2-44; *Fairman v. Helen Mining Co.*, 24 BLR 1-225, 1-231 (2011). Because claimant filed her survivor’s claim after January 1, 2005, her claim was pending after March 23, 2010, and the miner was receiving benefits under a final award at the time of his death, we affirm the administrative law judge’s finding that claimant is entitled to receive survivor’s benefits pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l). Director’s Exhibits 1, 2.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge